



Information & Privacy Law Confidential Advice

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FIPPA 6

Response to Requests for Access

Make every reasonable effort to assist applicants

Respond without delay to each applicant

Openly, accurately and completely

I & P Commissioners:

Be able to show that your efforts are thorough and comprehensive and that you have explored all reasonable avenues to locate records and assist.

Information Not Included or Redacted “not responsive to request”

A “record” includes:

books, documents, maps, drawings, photographs, letters, vouchers, papers and any other thing on which information is recorded or stored by graphic, electronic, mechanical or other means, but does not include a computer program or any other mechanism that produces records;

Is it the same as “information”? Not Quite

Section 4

**If *information* can be severed from a *record*,
an applicant has a right of access
to the remainder of the record.**

OIPC Adjudicators, in 2014, began to interpret decisions to withhold information as being “non-responsive” or “out of scope” as not valid

Order F14-27, reconsidered in ***F15-23***:

Deputy Commissioner: **Read section 4 with section 8:**

If access to a record ***or part of a record*** is refused, cite the reasons and the Part 2 section you rely on.

Unresponsive information

Order F15-56 City of New Westminster

Process information relating to closed meeting agenda and minutes that were unrelated to the applicant's request

Order F15-33 City of Vancouver – staff mistakenly identified *entire* records as responsive – later, FOI head withheld some of it as being out of scope .

>>> At Inquiry, Adjudicator agreed that the records *could* be withheld because they did not respond to the applicant's request.

What is an “entire” record?

- An entire phone book?
- A single page?
- A complete report?
- Schedules and Appendices?
- A stream of text messages?

FIPPA s 13 (1)

Advice or Recommendations

Purpose:

Encourage frank discussion

within the public service,

**keep investigations and deliberations focused on the
substantive issues,**

free of disruption from extensive and routine inquiries

BC Court of Appeal

College of Physicians & Surgeons 2002 BCCA 665

John Doe goes to Ottawa

- John Doe was a tax lawyer.
- Changes to Ontario corporate tax legislation closed some tax loopholes - retroactively. Clients were affected.
- John wanted records or parts of records that dealt with retroactivity and the effective date of the amendments,
- and all records providing reasons some provisions would *not* be retroactive.
- Draft policy options – early versions of a paper included in briefings to Minister - were found and refused.

FIPPA s 13 (1)

Advice or Recommendations

John Doe: IPC adjudicator ordered release: to qualify under 13 (1), information must have

- been communicated to the final decision maker so that it is part of the “deliberative process”, and
- must have recommended a single course of action

Ontario Court of Appeal disagreed: unreasonable – would render 13 (1) almost meaningless

SCC dismissed appeal: **“advice” and “recommendation” are distinct; and it does not matter whether information, as advice, actually reaches the final decision maker.**

Distinct words > distinct meanings

ADVICE

Broader in scope:
Policy options and
opinions by PB staff
including drafts, even if
uncommunicated

Gathering of facts,
opinions for
explanation, analysis as
necessary to decision

RECOMMENDATIONS

More explicit:
a suggested course of
action that will
ultimately be accepted
or rejected by the
person being advised

SCC: purpose of protecting “advice or recommendations” under 13 (1)

“The advice and recommendations provided by a public servant who knows that his work might one day be subject to public scrutiny is less likely to be full, free and frank, and is more likely to suffer from self-censorship....

a decision maker might hesitate to even request advice or recommendations in writing concerning a controversial matter if he knows the resulting information might be disclosed. Requiring (disclosure) risks introducing actual or perceived partisan considerations into public servants’ participation in the decision-making process”.

FIPPA 13 (2)

Information showing advice and Recommendations cannot be withheld on the basis of 13 (1) if it is:

- Factual material
- Public opinion poll
- Statistical survey
- Appraisal
- Economic forecast
- Environmental impact statement
- Final report or audit on PB's performance or efficiency or on its policies or programs
- Consumer tests report or PB equipment test report
- Feasibility or technical study re policy or project

FIPPA 13 (2)

...Cannot be withheld on basis of 13 (1), even if containing advice or recommendations:

- Report on field research undertaken before policy or program is formulated
- Report of task force, committee, council or similar body established to consider any matter & make reports or recommendations
- plan or proposal for new or changed program or activity if approved or rejected by FOI head
- Information cited publicly by FOI head as basis of a decision
- Adjudicative or discretionary decision affecting Applicant's rights

FIPPA 14

Solicitor-client Privilege

Professional Legal advice

- Confidential communication
- Between lawyer and client (agent)
- Related to seeking, formulating or giving legal advice

Litigation (“Lawyer’s Brief”)

- Information gathered for the dominant purpose of litigation
- In prospect or active

Legal privilege belongs to the client.

Only the client may waive the privilege.

Who is the Client in a local government context?

By Default:

- **CC 114 Council**
- **LGA 194 Board**

Consider seeking legal advice before waiving or making a decision to disclose.

Legal Advice Privilege Purpose

- “Free and candid communication between the lawyer and client protects the legal rights of the citizen. It is essential for the lawyer to know all of the facts of the client’s position. The existence of a fundamental right to privilege between the two encourages disclosure within the confines of the relationship. The danger in eroding solicitor-client privilege is the potential to stifle communication between the lawyer and client...”

R. v. McClure [2001] 1 SCR 445

Facts associated with legal advice: Legal fees

BC Commissioner: s 14 = new statutory right to know;
Disclosure ordered.

BC Supreme Court - Judicial review:

s. 14 preserves common law privilege as fundamental
right to communicate with counsel in confidence

No room for balance or compromise.

Communications need not contain advice, need only
relate to advice and be made *in confidence*.

Billing records must not be ordered disclosed.

Legal Services Society v BC (IPC) 1996; MIA & North Van v BC (IPC) 1996

FIPPA 14

Privileged communication – legal fees

Experienced counsel or assiduous inquirer may assess -

- State of preparation for trial
- Whether cost of expert opinion was incurred
- Minimal expenditure – expectation of compromise or capitulation

Disclosure could prejudice the right
to communicate with counsel in confidence

Municipal Insurance Association (BC) Ltd. v BC (IPC) 1996

FIPPA 14

BC Court of Appeal

Standard of review for s. 14 is strict: legal correctness.

Request for “top 5 immigration billers and top 5 criminal billers, by name and amounts billed.

Legal Services Society released amounts, refused names. Commissioner ordered disclosure.

Set aside by Court. Combining that with court registry information, an assiduous, vigorous seeker of information could derive elements of privileged communications

Legal Services Society v. BC (IPC) 2003 BCCA

Federal legislation and search warrant

Criminal Code provisions allowing for seizure from law office struck down as unconstitutional – Charter s 8 *Lavallee et al v Canada* 2002

Search warrant re gross legal fees quashed as unconstitutional: Charter s 8 *Maranda v Richer* 2003

The fact of the account is connected to solicitor-client relationship: presumed privileged.

Impairment of privilege should be kept to minimum and only as necessary.

BC Commissioner & BC Supreme Court

Commissioner ordered disclosure of total legal fee

Quashed by the Court: presumption of privilege prevails unless rebutted by evidence or argument that satisfies adjudicator that disclosure will not potentially reveal other privileged communication. Commissioner failed to give adequate weight to assertion by the Board that the information was responsive.

School District No. 49 (Central Coast) v BC (IPC) 2012 BCSC 427

FIPPA 14 Legal fee Orders

F15-16: Private Career Training Agency – ordered to disclose legal fee information

F15-31: City of Richmond ordered to disclose total amount paid to settle disputes with 2 former employees, as well as aggregate legal fees (judicial review sought)

F15-64: Ministry of Health ordered to disclose total amounts of legal fees paid re data breach investigation

Legal Advice Privilege

From an evidentiary rule to a principle of fundamental justice, an important civil right in Canada

Intrusion on privilege must be only as absolutely necessary to achieve object of enabling legislation

Legislation allowing incursion on privilege must be interpreted restrictively: not by inference

If any ambiguity, interpret as not stripping privilege

Canada v. Thompson 2016 SCC 21;

Canada v. Chambres des notaires du Quebec 2016 SCC 20

Legal Advice Privilege Legal fees and Accounts

Facts connected with solicitor-client relationship (such as bills of account) are presumed privileged absent proof to the contrary

Income tax legislation excluding “an accounting record of a lawyer” from solicitor-client privilege:
Constitutionally invalid

violation of ***Canadian Charter of Rights & Freedoms***

S 8: protection against unreasonable search and seizure

Canada (AG) v. Chambre des notaires du Quebec 2016 SCC 20

Canada (AG) v. Thompson 2016 SCC 21